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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term 1966

No. 733

STELLA PRUSA and
CHRISTINE PRUSA
Plaintiffs in Error,

vs.

JOHN CERMAK, JAMES JIROUS, JOAN JIROUS, JANE JIROUS, ADOLPH CERMAK, JOE CERMAK, JAMES JIROUS, WESLEY CERMAK, ELIZABETH SWARTZ, ANNA SAWREY, GEORGIA HOCK, HELEN PEMBLETON and BLANCH ADAMS
And the unknown heirs, executors, administrators, trustees, devisees and assigns, if any, immediate and remote of Wensel Hynek and W. Hynek, and of Josephine Hynek and of Joseph B. Hynek, also known as Joseph Hynek, and of Fanny A. Prusa, also known as Fanny Prusa, Fannie Prusa and Fannie Prucha, and of Aton Prucha, and of Anton Prusa, and of Anna Cermak, and of Josephine Jirous, also known as Josie Jirous, and Josie Hynek Jirous, and of Pauline Hynek, also known as Lene Hynek, each deceased.

Defendants in Error.

PETITION FOR WRIT OF CERTIORARI

STELLA PRUSA and
CHRISTINE PRUSA,
Petitioners.

CLYDE V. COLLINS
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Enid, Oklahoma

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of Council

October 1966

King Law Brief COMMERCE EXCHANGE BLDG., OKLAHOMA CITY — CE 5-2988

INDEX

PAGE

A. Opinions Delivered in Courts Below 2

B. Jurisdiction of This Court 2

D. The Statutes Involved 4

Title 42 U.S.C.A. Sec. 1988 4

Title 12 Oklahoma Statutes, 1961 Sec. 2 5

Title 12 Oklahoma Statutes, 1961 Sec. 1501 5

E (and F.) Concise Statement of The Facts of The Case 6

G. Review of The Judgment of a Federal Court 8

H. Argument 8

North v. Coffey, 200 Okla. 44, 191 P 2d 220 9

Smith v. Norton, 206 Okla. 422, P 2d 980 (1952) 10

Eubanks v. Landram, 59 Tex. 247 10

Sweeney v. Bay State Oil and Gas Co., 192 Okla. 28, 133 P. 2d 538, 541 11

Wolfe v. Stanford, 179 Okla. 27, 64 P 2d 335 11

I. and J. Copies of Opinions Delivered Upon The Rendering of The Judgment Sought To Be Reviewed 12

Appendix 13

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term 1966

No.

STELLA PRUSA and

CHRISTINE PRUSA

Plaintiffs in Error,

vs.

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And the unknown heirs, executors, administrators, trustees, devisees and assigns, if any, immediate and remote of Wensel Hynek and W. Hynek, and of Josephine Hynek and of Joseph B. Hynek, also known as Joseph Hynek, and of Fanny A. Prusa, also known as Fanny Prusa, Fannie Prusa and Fannie Prucha, and of Aton Prucha, and of Anton Prusa, and of Anna Cermak, and of Josephine Jirous, also known as Josie Jirous, and Josie Hynek Jirous, and of Pauline Hynek, also known as Lene Hynek, each deceased.

Defendants in Error.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma, entered in the above entitled case on May 10, 1966.

A. OPINIONS DELIVERED IN COURTS BELOW.

The memorandum decision was vacated by order of the case in the Supreme Court of the State of Oklahoma on February 15, 1966. This memorandum decision was not officially reported. It appears at pages 122 and 123 of the Transcript.

The memorandum decision was vacaed by order of the Oklahoma Supreme Court on April 19, 1966. The order was not officially reported but is shown at Page 128 of the Transcript.

Thereafter, an opinion was filed by the Oklahoma Supreme Court on May 10, 1966, which will not appear in the Pacific Reporter because the mandate was stayed, but it is shown at pages 129-133 of the Transcript.

B. JURISDICTION OF THIS COURT.

The jurisdiction of this court is invoked under the Vth and XIVth Amendments of the Constitution of the United States in that the petitioners are being deprived of their property without due process of law and, further, are not receiving equal protection of the law.

(1) The date of the Decree of Partition in the District Court in and for Noble County, Oklahoma, was dated January

27, 1964, and was filed of record in that court on February 3, 1964 (pp. 46-56 Transcript). The order approving the report of commissioners and order of sale was issued March 16, 1964 and filed April 2, 1964 (pp. 87-89 Transcript).

An appeal to the Supreme Court of the State of Oklahoma was perfected on December 6, 1964.

The final opinion of the Oklahoma Supreme Court was, as stated above, filed May 10, 1966 (pp. 129-133 Transcript) but the Mandate enforcing the same was stayed on September 12, 1966. (p. 142 Transcript).

(2) A petition for re-hearing was filed in due time, but on July 5, 1966, an order was entered denying a re-hearing (p. 136 Transcript).

Application was made for leave to file a second petition for re-hearing, which was denied by order of the Supreme Court of Oklahoma on August 2, 1966 (p. 141 Transcript).

(3) It is believed that Title 28 U.S.C.A. Sec. 1257 and Title 42 U.S.C.A. Sec. 1988 confer on this court, jurisdiction to review by writ of certiorari, the judgment of the Supreme Court of the State of Oklahoma.

(1) Whether or not a Federal Grant that remained a homestead which, by State Law is not subjected to forced sale, can be partitioned.

(2) Whether the common law as adopted by State Statute, merely by reference, permits partition when coparceners hold an undivided interest in land with joint tenants with rights of survivorship.

(3) Whether under a State Statute requiring Commissioners to appraise land to be partitioned, such Commissioners' report must affirmatively show why "manifest injury" would be caused by partitioning in kind.

(4) Whether or not property improperly partitioned by a State Court in violation of its own statutes and decisions is a deprivation of property without due process of law.

(5) Whether joint tenants with rights of survivorship are receiving equal protection of the State law when caused to partition with or from Co-parceners.

D. THE STATUTES INVOLVED.

Title 42 U.S.C.A. Sec. 1988 reads as follows:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not consistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

The Oklahoma Homestead Exemption is provided under Article 12, Section 2 of the Oklahoma Constitution which is as follows:

> "The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage.

Title 12 Oklahoma Statutes, 1961 Sec. 2:

> "The Common Law, as modified by Constitutional and Statutory Law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the Common Law that the statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statutes of Oklahoma; but all such statutes shall be liberally construed to promote their object."

Title 12 Oklahoma Statutes, 1961 Sec. 1501:

> "When the object of the action is to effect a partition of real property, the partition must describe the property and the respective interests of the owners thereof, if known."

The provisions of Title 12 O. S. 1961 subsequent to Section 1501, set forth the procedure to be followed in Oklahoma in partitions. They are not pertinent herein except Title 12 Oklahoma Statutes 1961 Section 1509 provides:

> "The Commissioners shall make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury. But if such partition cannot be made, the Commissioners shall make an evaluation and appraisement of the property. They shall make a report of their proceedings to the court forthwith."

E. (and F.) CONCISE STATEMENT OF THE FACTS OF THE CASE.

Tract No. 1 (160 acres) is in Noble County, Oklahoma. Tract No. 2, or two lots, is in the Town of Lucien, Noble County, State of Oklahoma and tract No. 3 (160 acres) is in Garfield County, State of Oklahoma.

It is important to note (and never has it come out in the Oklahoma Courts) that the mother of Petitioners herein, Fanny Hynek, received that portion of land known as "Tract No. 1" by federal grant from President William McKinley on the 26th day of July, 1899 (Certificate No. 376). (See: Appendix i)

The portions owned by the respective owners is not in question. It is unquestioned that the Petitioners owned 48/240ths interest in each of Tract 1, 2 and 3, as joint tenants,

and not as tenants in common, with full rights of survivorship, having acquired their interest from their mother, Fanny Hynek Prusa, by joint tenancy deed. It is further uncontroverted that petitioners each owned an additional undivided 6/240ths interest in each of the three tracts, having acquired these interests by inheritance. In all, the petitioners own together an undivided one-fourth (1/4th) interest in each of three tracts.

All of the other defendants and the plaintiff below, are co-parcenors with the Petitioners but the Petitioners hold one-fifth (1/5th) of the entirety by Joint Tenancy. The remaining interests other than petitioners, are various undivided portions (all received by inheritance) no single person having as large an interest as that of the petitioners.

The trial court decreed partition and appointed Commissioners (pp. 46-56 Transcript). One of the Petitioners was present in court but not represented by counsel. In her way, the Petitioner present objected to the partition noting her desire that the Petitioners retain their undivided one fourth interest.

The Commissoners reported that partition of the respective tracts "cannot be made between the parties to this action according to their respective interests, without great and manifest injury to said parties." The Commissioners did not state affirmatively why nor how this "great and manifest injury" would be caused.

In their manner the Petitioners objected to the report of the Commissioners (pp. 66-67 Transcript) setting forth their desire to take their one-fourth in kind.

Petitioner, Stella Prusa appeared as a witness in support of her objections. She did not object to partition of Tract No. 2. Tract No. 3 was shown to be unquestionably under lease and not the homestead of the petitioners. Tract No. 1 was not conclusively shown not to be the homestead of the Petitioners. It was not established by the Trial Court, nor inquired into by the Supreme Court of Oklahoma of what the "family" of the Petitioners consisted with respect to the maintenance of a homestead in Tract No. 1 particularly. (p. 77 Transcript). Forced sale of the property was decreed (pp 87-90 Transcript). Thereafter, sale has been forestalled by the appeal to the Supreme Court of Oklahoma and by this Petition for Writ of Certiorari.

G. REVIEW OF THE JUDGMENT OF A FEDERAL COURT.

No judgment of a Federal Court is here in issue.

H. ARGUMENT.

(1) With respect to Tract No. 1 only, this tract came to Petitioners' mother by original federal grant (see Appendix i) as a homestead and thereafter by Petitioners' mother, Fanny Hynek Prusa, to the Petitioners as joint tenants with rights of survivorship.

Petitioners are the children of the original family to whom the homestead was guaranteed by the laws of Oklahoma.

This Tract No. 1 was not conclusively shown not to be the homestead of the Petitioners.

The homestead in Oklahoma is not subject to forced sale. Therefore, the Petitioners could not be forced to sell by partition.

(2) At common law, the right of partition applied only to co-parceners. The application of the common law doctrine of partition has been expanded by some State statutes to other types of co-tenancy.

Such expansion is not true of the law of the State of Oklahoma since Title 12 Oklahoma Statutes, 1961 Section 1501 (quoted supra) merely adopted the common law rule without expansion. Neither have the decisions of Oklahoma sufficiently expanded the common law rule to cause joint tenants to partition with co-parceners. Indeed, the Supreme Court of Oklahoma has held (in re Pryor's Estate, (Okla.), 181 P 2nd 979 (1947) that although title by purchase includes every known method of acquiring an estate except that by which it passes to an heir by operation of law, it is generally held that a partition suit does not change an estate otherwise ancestral to an estate of purchase.

The only expansion effected by the Oklahoma Supreme Court has been in *North* v. *Coffey*, 200 Okla. 44, 191 P 2d 220:

> "Under this modern doctrine it is applicable only to cases in which property is held in co-tenancy." (p. 131 Transcript)

Co-parceny is not co-tenancy. Co-parceners may partition among themselves but they cannot under Oklahoma law force Joint Tenants to partition from the co-parcenors. Petitioners hold a one-fifth undivided interest in joint tenancy between themselves with rights of survivorship. The joint tenants should not be forced to partition upon the petition of a co-parcener holding a minute interest of 1-1/3 acre.

(3) It has become the practice in Oklahoma, as in this case, that Commissioners in suits for partition merely state (p. 63 Transcript):

> ". . . and we do hereby find that partiton of each of said tracts of land cannot be made between the parties to this action according to their respective interests without great and manifest injury to said parties, and so certify."

With objections having been made to the Commissioners' report, the trial court in no way satisfied itself that the preference in favor of partitioning in kind was overcome. (See: *Smith* v. *Norton*, 206 Okla. 422, P 2d 980 (1952).

(4) The Constitution of the State of Oklahoma, Article 12, Section 2, quoted supra, guarantees that the homestead shall not be subject to forced sale for the payment of debts. The homestead cannot be partitioned. (*Eubanks* v. *Landram*, 59 Tex. 247) This point has not been passed upon by the Oklahoma Supreme Court.

If, then, partition of a homestead is being permitted by the Oklahoma Court, these petitioners are being deprived of their property without due process of law within the State of Oklahoma.

(5) The remedy of partition as generally stated is to enable those who own the property as co-parceners, joint tenants or tenants in common, to put an end to the tenancy and to rest in each of them, title to, and the use in severalty of, some definite part of the property and in common so that each may take and enjoy and improve his separate estate without let or hindrance from the other. (*Sweeney* v. *Bay State Oil and Gas Co.*, 192 Okla. 28, 133 P 2d 538, 541).

But never has the rule been established or stated to be other than that co-parceners may separate among themselves; joint tenants may separate among themselves and tenants in common may separate themselves. Thus, to partition two joint tenants from numerous co-parceners is to mis-state and mis-apply the common law rule. The common law rule has not been expanded to this extent by Oklahoma Decisions.

Further, the remedy of partition is in its nature equitable, even when statutes have been enacted dealing with the subject.

> "There being no statutory inhibition against the denial of relief, the power of the court is sufficiently broad to prevent the use of the remedy as an instrument of oppression." (*Wolfe* v. *Stanford*, 179 Okla. 27, 64 P 2d 335)

To permit a misuse of the law of Oklahoma as invoked by one plaintiff holding a minute one and one-third acre interest by inheritance as against the children of the original homesteader of a federal grant is inequitable, unjust and not an equal protection of the law.

I. and J. COPIES OF OPINIONS DELIVERED UPON THE RENDERING OF THE JUDGMENT SOUGHT TO BE REVIEWED.

The only such opinion here in question is that of the Supreme Court of the State of Oklahoma found at pages 129-133 inclusive of the Transcript.

THEREFORE, petitioners respectfully request that a writ of certiorari issue to the Supreme Court of the State of Oklahoma.

STELLA PRUSA and
CHRISTINE PRUSA,
Petitioners.

CLYDE V. COLLINS
304 Broadway Tower
Enid, Oklahoma

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710 Citizens Bank Tower,
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of Council

October 1966

The United States of America

To All To Whom These Presents Shall Come, Greeting:

Certificate No. 376.

Whereas, Fanny Hynek of Noble County Oklahoma has deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Perry Oklahoma whereby it appears that Full Payment has been made by the said Fanny Hynek according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands" and the acts supplemental thereto, for

The Lots numbered one and two and the South half of the North east quarter of Section Two, in Township Twenty Two North of Range One West of Indian Meridian, in Oklahoma, containing one hundred and Fifty seven acres and forty two hundredths of an acre, according to the Official Plat of the Survey of the said Lands returned to the General Land Office by the Surveyor General, which said Tract has been purchased by the said Fanny Hynek.

Now know ye, That the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, Have given and granted, and by these presents Do give and grant, unto the said Fanny Hynek and to her heirs, the said Tract above described; To Have and to Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Fanny Hynek and to her heirs and assigns forever.

In Testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twenty-sixth day of July, in the year of our Lord one thousand eight hundred and Ninety nine, and of the Independence of the United States the one hundred and twenty fourth.

By the President: William McKinley

By J. M. McKean, Secretary

Seal

C. H. Brush, Recorder of the General Land Office.

Filed for record the 31st day of Aug 1899 at 9:30 o'clock A. M.

A. W. TUCKER
Register of Deeds.

Appendix 1